

# Party Autonomy, Choice of Law and Wrap Contracts

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# 1 Introduction

The internet contributes to the reduction of transactional cost and as the result to the growth of commercial activities across the world, thus the commercial activities in online environment have been increasing dramatically. At this point, it is necessary to regulate these activities efficiently in order to provide secure transaction environment to induce customers and businesses to take part in online commercial activities. However, a lack of trustworthiness in the electronic transactions leads to the situation that discourages consumers and businesses to get involved in further commercial activities on the internet. In that case, online consumer contracts take an important role, because consumers do not trust online merchants to provide them reliable contract terms which consumers do not have chance to negotiate and review properly. Those contracts, namely standard contracts, are arranged in line with the intention of businesses and it provides consumers limited bargaining power by giving them only opportunity to agree it or not.

## 1.1 Scope

The standard contracts which are called wrap contracts in information technology sector are based on one party (businesses) autonomy. Obviously, it does not satisfy the basic principle of contract law such as party autonomy, because the autonomy consists of mutuality and freedom on the terms of contract<sup>1</sup>. However, wrap contracts do not provide mutuality by letting businesses to decide which terms would be drafted without giving any chance consumer to negotiate any term that they do not satisfy. On the other hand, the parties of contract have both freedoms to decide the terms of contract which may affect the further responsibility or duty of the parties after contract making process. Those characteristic of party autonomy have close relationship with each other and could not be divided each other.

In fact, wrap contracts do not fully comply with party autonomy principle in the traditional contract law. However, it is clear that the enforceability of wrap contracts has accepted in both EU and US. The fairness of wrap contract is still controversial on the basis of party autonomy, because consumers are not in position to properly review and negotiate the terms of the contract. On the other hand, consent is another problematic issue in wrap contracts, because parties must be well informed to agree to be bound by contractual obligations. But, consumers are usually not aware of all the terms of wrap contracts before entering into contract due to distracting presentation of the contract.

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<sup>1</sup> Zhang, Mo. Contractual Choice of Law in Contracts of Adhesion and Party Autonomy. 2007. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1017841](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017841) (visited 15 October 2012)

Another important debate on wrap contracts discusses the enforceability of choice of law clause on the basis of party autonomy. The choice of law clause is an important part of the contract, because it is used to ascertain the contractual obligations of the parties. Thus, it is necessary to respect the party autonomy principle when parties draft the choice of law clause. However, the wrap contracts let businesses to choose a law of the country that is most favorable to them. Therefore, consumer protection is an important issue which must be regulated as a limitation on party autonomy in choice of law, because the enforceability of wrap contracts has been commonly accepted. Otherwise, consumer rights would be harmed by aggressive commercial practice.

## **1.2 Aims**

Obviously, there is no doubt on the enforceability of wrap contract, thus it is necessary to analyze as to what extent choice of law clause of wrap contract would be enforceable. In fact, customer may have a difficulty to understand and review the choice of law clause due to design of the contract. Sometimes contracts might be drafted in a tricky way to distract customers to read and understand the real meaning of terms. At this point, the question arises whether the consent is given to choice of law clause even if consumer could not understand it. In private international law, the duty to read principle considers that parties have a responsibility to read the terms of contract in order to give their consent to enter into contract. In the context of these contracts, it is difficult to implement the duty to read principle because of the nature of the contract. It is suggested in US to test the fairness of choice of law clause that analyze whether it is deemed as consent to choice of clause when party agree to enter into contract which is called doctrine of unconscionability. In other words, it works for finding out if consent is given to be bound by choice of law clause, because choice of clause requires clear consent to be enforced in contract law. Thus, the question arises whether it would be fair to bound consumer with choice of law clause if consumer does not have any idea about it?

On the other hand, it is obvious that wrap contracts bias on the online merchants and market efficiency without considering consumer protection; however it is important to increase consumer protection in order to increase growth of the market. As a result, the fairness of wrap contracts is still in doubt without autonomy of the both parties even if it is enforceable. In that case, the fairness means whether choice of law in wrap contracts constitutes aggressive commercial behavior against consumer in the context of international private law. Consequently, consumer protection has been provided in both the EU and the

US, but it is controversial whether those rules provide efficient protection for consumer contracts.

### **1.3 Methods**

This article examines the choice of clause in wrap contracts with consideration of party autonomy by analyzing existed rules in the EU and the US. In order to reach concrete analysis, the relationships of party autonomy, choice of law and electronic standard contracts (wrap contracts) are presented in order to provide basic infrastructure to ascertain the consumer aspect problems. Also, the case law is important to indicate the problems, however there are small amount of cases exists in this field of law. Thus, the popular cases from the US, EU and Australia is analyzed to find out the problems which are caused by the lack party autonomy in wrap contracts. Consequently, the problem definition is helpful to evaluate the efficiency of the recent rules.

Rome Convention is the one of the most well accepted international treaty which governs choice of law rules for contractual obligations. Also, it has been converted into Rome I Regulation and it provides a kind of solution upon one sided autonomy to choose law of the contract by providing consumer protection provision. On the other hand, UCC stipulates contractual relationships in commercial area and UCITA (Uniform Computer Transaction Act) is specific legislation which governs e-commerce transactions and choice of law issues. In fact, it is highly criticized due to its nature that based on businesses autonomy and it allows parties to choose any state law regardless any relation to contract which means businesses could choose to a law of the country in favor of their commercial purpose. As a result, it is beneficial to analyze two different mentality of choice of law principle in the EU and the US in order to understand the importance of autonomy and consumer protection in e-commerce.

### **1.4 Structure**

In the article, analysis of party autonomy for choice of law is presented in the second chapter in order to provide reference to next part which gives information on different kind of wrap contracts. Also, CISG is referenced to indicate the existing party autonomy rules in contract law. In third chapter, the main purpose is finding out whether the wrap contracts fulfill the basic principle of part autonomy in contract law. From this way, it is possible to understand the deficiency of wrap contracts in the context of choice of law, party autonomy and consumer protection in contract law. Third part of the article provides recent regulatory effort to deal with choice law clause in wrap contracts by analyzing both the US and the EU

approaches. The analysis of two different choice of law principle provides a way to find out the method to test the fairness of choice of clause in wrap contracts with consideration of previous parts.

## 2 Part Autonomy

The most important principle of contract law is the party autonomy in which ‘a party exercises autonomy in deciding who to contract with; on what terms to contract; and how to behave in the course of performance’<sup>2</sup>. It means that parties must be well informed upon the every necessary subjects of the contract such as other party, terms and result of the contract in order to evaluate what they are offered to promise. After this step, they can only present their intention to enter into contract by freely given consent. Thus, the intention of parties has been emphasized by Dr. Nagla Nassar; ‘*No one person’s will is supreme: rather, the contractual relationship is regulated, giving both parties equal entitlement to continue the relationship.*’<sup>3</sup>

Along with the explanations above, it is fair to say that the party autonomy consists of two main characteristics which are firstly freedom to decide contractual terms without any influence or constraint and any intervention by judicial power, secondly mutual consent upon contractual terms or entering into contract. Also, parties need to know explicitly what the terms of contract refer in order to negotiate and give their consent freely. When party offers the contractual terms, another party must understand it in order to begin negotiating the terms that do not fit to his/her interest. At this point, freedom of contract fulfills its duty to provide free bargaining power to the parties of contract.

### 2.1 Party Autonomy and Basic Principle of Contract Formation

Party autonomy has been a common principle in contract law, thus it has been drafted into one of the most international convention in contract law. Article 19 of CISG (United Nations Convention on Contracts for the International Sale of Goods) states that ‘*A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*’<sup>4</sup>, therefore it provides bargaining power to parties by letting them to negotiate the terms of contract in line with their interest. The provision set requirements to form the enforceable contract in a way that one party states his/her intention as an offer while other gives consent to what has been offered if he/she satisfies with it, otherwise it is possible to negotiate to terms as a counter offer. It represents all characteristic of party autonomy such as freedom of contract by deciding the contractual terms and equal bargaining power by letting parties negotiate the terms as to what

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<sup>2</sup>Reiner, Schulze, Geraint Howells & Andre Janssen. Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness Andre Janssen. Ashgate Publishing. 2005. pp 3

<sup>3</sup> Nygh, Peter. Autonomy In International Contracts. Oxford University Press. 1999. pp.29

<sup>4</sup> United Nations Convention On Contracts For the International Sale of Goods, 1980. Article 19



they give consent. In fact, it is not the only provision to emphasize party autonomy but also Article 6 provides freedom to parties to decide which law of the country will govern their contract.

The one of the important part of the contract law is the freedom of contract which is the first step to comply with party autonomy principle, because parties could not perform bargaining power without freedom to decide terms of the contract. The freedom of contract has been stipulated into The Principles of European Contract Law as;

*(1) Parties are free to enter into contract and to determine its contents, subject to the requirement of good faith and fair dealing, and the mandatory rules established by these Principles.*

*(2) The parties may exclude the application of the any of the principles or derogate from or vary their effects, except as otherwise provided by these principles<sup>5</sup>.*

In fact, party autonomy has not been implemented to provide parties a complete freedom to decide contractual terms, because legislation sets some limitation to protect public or individual interests. In that case, expression of ‘good faith’ and ‘fair dealing’ represent the private or individual interest that is aimed to protect such as protection of weaker party of the contractual relationship. On the other hand, the most common limitation is mandatory rules especially in conflict of law which prone to give courts authority to decide as to what extent the terms would be enforceable. Mandatory rules aim to protect morality, equity and public interest which can be seen in both EU and US legislations. In the context of international contracts, it is difficult to simplify the applicable law of contract, because every country tries to protect their own public policy by implementing limitation on party autonomy. Thus the question arises to what extent parties’ chosen law would govern their contract? Consequently, parties are given right to freely form their contract as it is allowed by the rules of the contract law.

## **2.2 Party Autonomy in Choice of Law**

In cross-border transaction, parties of contract expect to deal with the rules which they are familiar with. In fact, this expectation is emphasized by party autonomy principle in a way that parties must know what kind of obligation they will undertake by entering into contract which is only possible if they have right to choose the governing law of their contract. Thus, it is necessary to provide freedom of contract to parties for choice of law, because the applicable law impacts the enforceability and result of the contract such as contractual obligation after

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<sup>5</sup>The Principles Of European Contract Law Art, 1999. Article 1/102

entering into contract. Thus, in private international law, ‘party autonomy in relation to contract is generally taken to refer to the entitlement of parties to select the law under which their contractual terms will be interpreted and the jurisdiction in which those terms will, in the event of a dispute, be enforced’<sup>6</sup>. The application of party autonomy in choice of law gives parties an opportunity to negotiate the choice of law clause so parties would choose the law that is most favorable to pursue their own interest.

Along with the fact that parties have been given a chance to negotiate the choice of law clause and decide which law of the country will govern their contract<sup>7</sup>, there are some limitations upon this freedom to protect some specific interest; the most prevalent ones are reasonable connection theory, mandatory rules and public policy of the subject country. Also, those limitations have been criticized not to provide explicit or specific method to be applied properly in order to establish common principle in cross-border contractual relationships.

### **2.2.1 Limitations of Party Autonomy by Choice of Law Rules**

It has been commonly accepted that parties must be free to choose the applicable law for their contract in the situation where they are entitled to freedom of contract<sup>8</sup>. In this context, the question arises whether the parties’ choices would be enforced in subject country or to what extent it would be enforced? At this point, limitations upon party autonomy in choice of law aim to clarify these questions by stipulating some tests.

The one of the type of test is reasonable connection requirement which requires relationship between parties, transaction and the chosen in order to justify the parties’ choice. The court declared in *Vita Food Products Inc. v Unus Shipping Co.* that ‘*Connexion (with the chosen system of law) is not as a matter of principle essential*’<sup>9</sup>, however countries aimed to protect their own interest at this time by setting connection requirement for chosen law. In fact, it shows that parties do not have complete freedom of choice of law in contracts. The necessity of this connection test has been justified by the reason that the limitation provides better opportunity to protect public and individual interest of the subject country. Obviously, it is prone to increase enforceability of mandatory rules of the country.

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<sup>6</sup> Johns, Fleur. *Performing Party Autonomy*. 2008.

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=lcp> (visited 11 October 2012)

<sup>7</sup> Watt, Horatia Muir. ‘Party Autonomy’ in *International Contracts: From The Making of Myth to The Requirement of Global Governance*.

[http://www.columbia.edu/cu/alliance/Papers/Article\\_Horatia-Muir-Watt.pdf](http://www.columbia.edu/cu/alliance/Papers/Article_Horatia-Muir-Watt.pdf) (visited 11 October 2012)

<sup>8</sup> Zhang, Mo. *Party Autonomy And Beyond: An International Perspective of Contractual Choice Of Law*. 2008.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1084331](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084331) (visited 13 November 2012)

<sup>9</sup> Nygh (1999) p.11

On the other hand, an important question to clarify reasonable connection is how court would ascertain whether there is reasonable connection. In this case, there are no commonly accepted methods; some method suggests that performance of the contractual obligation must be considered while another is based on the all relevant factor of parties and transaction. According to the method, it is important to take an account where parties made the contract (place of contract) and where contractual responsibility will be fulfilled (place of performance). The second one considers the country of parties and the place of contract or performance as reasonable connection. When international nature of contract is taken into account, the lack of common method upon testing reasonable connection would give a discretion power to discard the chosen law which definitely causes controversy between different jurisdictions. At this point, convergence of court decisions contradicts with freedom of contract even if limitations have been stipulated by law, because party autonomy principle requires no court intervention upon their choice<sup>10</sup>. Thus, there are no commonly accepted methods for definition of limitations which gives courts an authority to decide the aspect of limitations and this situation led the courts to disregard the chosen law.

The other limitation is based on the policy which requires to prevent chosen foreign law from violate public policy or order. In this case, chosen law must not be against the law of the forum and the choice should not evade the mandatory law of the country. The public policy theory aims to protect morale, social security, citizen welfare by implementing public policy limitations<sup>11</sup>. However, it is difficult to define what public policy is and to what extent chosen law would be deemed as unenforceable in the context of law. It is too wide expression and it has been criticized as ambiguous. Also, it gives courts an authority to decide whether the choice would evade the public order. At this point, it is important to ascertain to what extent foreign law evade forum law, because the choice could not be disregarded if there is no fundamental violation of public order.

Also, parties might choose some country law to apply contractual relationship, in order to prevent mandatory rule of the proper law of the country from applying their contract. In *Golden Acres Ltd v. Queensland Estates Pty Ltd*, parties agreed the choice of law term as *'For all purposes arising under this agreement, the same shall be deemed to be entered into in the colony of Hong Kong.'* and supreme court stated that *'proper law of the contract' in respect of the contract contained in that document would clearly be Queensland. The selection of a law other than that of Queensland was made for the specific purpose of*

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<sup>10</sup> Zhang, Mo. (2007)

<sup>11</sup> Zhang, Mo. (2008)

*avoiding the consequences of illegality which would or might have followed if the Queensland law applied*<sup>12</sup>. It shows the reasoning of limiting the party autonomy for choice of law, because the party, who has more knowledge on the subject transaction, would exploit the party autonomy by selecting most favorable law to him.

Basically, the term “mandatory” means that the rule cannot be excluded by a contract term and is a ‘directly applicable rule capable of overriding the chosen law’<sup>13</sup>. It is to say that parties do not have any chance to derogate the mandatory law of the country which they are citizens. The mandatory rules aim to protect either interest of state and individuals. In the context of state interest, it provides the protection of the national heritage and rules which prohibit discrimination<sup>14</sup>. Also, another purpose of mandatory rules concerns more economically protection which tries to protect weaker parties from aggressive commercial activities by limiting freedom of contract in specific field of transactions.

In fact, the mandatory rules has been implementing in two ways to limit party autonomy. First one limits party to make a choice upon applicable law to certain legal issues. In that case, one of the most popular ones is to limit the party autonomy concerning real property issues. If parties choose any law of the country to govern their contract upon real property, the chosen law shall be disregarded by court, because it has been stated that the law of the country where the real property is located, will govern the contractual relationship in question. Another way to limit is that certain exceptions are stipulated over party autonomy to protect both public and private interest. In this context, the certain type of contract has been classified in the provision which prohibits parties to choose the law to govern their contract. If parties choose any foreign law to apply contract, the choice of law provision will be deemed as void and proper law of the country will be applied to contractual relationship.

The mandatory rules seem to have similarity with public policy, however the functionality of mandatory rules are different than public policy which mainly aims to disregard the chosen law to be able to defend interest of the national policy. On the other hand, mandatory rules enforce the party autonomy and give parties a right to choose the governing law for their contract but set some limitations to protect both public and private interests. In this context, mandatory rules are more prone to respect party autonomy in comparison with public policy. In fact, the mandatory rules have been criticized as being

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<sup>12</sup>Golden Acres Ltd v. Queensland Estates Pty Ltd, 1969.

<http://www.law.stetson.edu/studyabroad/china/media/WEEK.2-Zeller.Golden-Acres-Ltd-v-Queensland-Est.pdf>  
(visited 19 october 2012)

<sup>13</sup> Zhang, Mo. (2008)

<sup>14</sup> Nygh (1999). P.199-211

unclear which provides authority to courts to define the ambit of the limitations. At this point, it has a similarity with public policy which is difficult to ascertain to what extent it should be implemented the possible cases. Court has to define mandatory rules by considering the intention of government upon what they aim to protect. Also, it is important to consider if mandatory rules intend to protect weaker party of the contract such as consumers when court defines the ambit of the mandatory rules. In that case, *‘if protection could be rendered nugatory by the simple expediency of choice law clause, the law would be ineffective in its aim’*, as the comment of Kitto J. in *Kay’s leasing Corporation v. Fletcher* (1965).<sup>15</sup>

### **2.2.2 Consumer Protection Aspect of Part Autonomy in Choice of Law**

Consumers are considered as weak party of contract due to fact that businesses are in more efficient position to bargain for terms of contract. Because, businesses would have profound knowledge and experience on their working field<sup>16</sup>, for example they could easily ascertain which law of the country is most favorable to govern contractual obligations, especially large scale companies may have legal department to conduct the contract making process. Thus, consumers have a difficulty to understand the complex terms of the contract which may deprive the consumer protection by implementing the governing law that is more favorable for businesses to pursue their commercial interests. When the issue comes to ‘duty to read’ which deems parties responsible for the result of contract if they have chance to read the terms, consumers must be aware of the choice of law clause in order to be subject to ‘duty to read’ rule. However, consumers could easily be tricked by confusing text of the contract which is difficult follow for consumer at time of contract making. Therefore, the needs of consumer protection in choice of law against aggressive commercial practice have been recognized and some limitations have been implemented on party autonomy for consumer contracts.

The limitations are implemented to protect some specific interest along with the consideration of consumer aspect in a way that consumer contracts are excluded from the general principle. The exclusion requires some test to ascertain whether chosen law decrease the level of consumer protection in comparison with the default law the country which sometimes would be the place of consumer’ habitual residence or the place of forum. In addition, the tests vary from reasonable or most significant connection to most favorable rules

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<sup>15</sup> Nygh. (1999) p.210

<sup>16</sup> Reiner, Schulze. (2005). p.5

analysis between the chosen law and the default law. However, it has not been achieved to establish common principle to test the applicability of chosen law in consumer contracts.

### 3 Electronic Standard Contracts and Party Autonomy

Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Business Law Section of the American Bar Association (ABA) has presented set of principles to test the enforceability of wrap contracts in consideration of traditional rules of contract law and these principles mainly based on that:

1. *The user is provided with adequate notice of the existence of the proposed terms,*
2. *The user has a meaningful opportunity to review the terms,*
3. *The user is provided with adequate notice that taking a specified action manifests assent to the terms,*
4. *The user takes the action specified in the latter notice*<sup>17</sup>.

Those principles are useful criteria to set a precedent to decide whether the wrap contracts are enforceable. Also, those set of principles aim to fulfill the party autonomy in line with traditional contract law. Parties must know what they bargain for and what kind of obligation they will undertake by entering into contractual relationship. Therefore, the first two principles aim to support these requirements. On the other hand, the last two principles aim to provide adequate environment for party to give their consent to terms of the contract which requires merchant to notice the existence of the terms and possible result and obligations of the concluded contract. Because, party could only be deemed to give valid assent if they are informed what they get involved.

In addition, party autonomy stipulates mutuality principle which covers both free bargain and the result of this process between parties<sup>18</sup>. In the context of wrap contracts, online merchants use their bargaining power by drafting one-sided contractual terms and give their consent to be bind with it by presenting it on the webpage. On the other hand, consumers could only have an opportunity to use bargaining power by reviewing the terms of the contract and give their consent to them by clicking through or using webpage and software or product. Thus, debates have been arising whether the wrap contracts are enforceable and to what extent the wrap contracts fulfill the requirement of traditional contract law. In order to reach concrete analysis in this context, it is necessary to analyze different contract formation process in wrap contracts.

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<sup>17</sup> Kunz, Christina L. Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreement. 2003. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1640185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640185) (visited 21 October 2012)

<sup>18</sup> Mo, Zhang. (2007)

### 3.1 Shrink-Wrap Contracts

Those types of contract have been mostly using by software companies which pursue ‘take it or leave it basis’<sup>19</sup> style of contracting. In this type of contracting style, consumers could only have an opportunity to review contractual terms after going through payment process. When consumers received the product, the notice on the package does not give consumers any chance to see terms of the contract and get them confused by stipulating that consumers would agree terms inside the package right after opening the package. In addition, Technological development disregards the usage of physical license agreement<sup>20</sup>, thus consumer can only review additional terms of the contract before begin to use the software which requires consumer to agree those terms of contract before installing it. In fact, consumer needs to know what kind of responsibility or result would be arising if they enter into contract in order to consider whether they agree to get involved in transaction. Scott Adams has depicted this situation with a cartoon:

*Dilbert: I did not read all of the shrinkwrap license on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion.*

*Dogbert: Call your lawyer.*

*Dilbert: Too late. He opened software yesterday. Now he's Bill's laundry boy.*<sup>21</sup>

In the context of party autonomy, terms of the contract must be clear in order to provide the other party of the contract an opportunity to review the possible result of the contract. Obviously, this type of contract does not fulfill this requirement, for instance in online transaction, consumers pay money and receive the software, but they see the terms of contract while they are trying to install it. In that case, they could not use the software without agree terms and condition which means that they are forced to agree it, because they have already agreed to bind by the terms by giving the consent to payment. Therefore, there have been debates upon whether the terms of contract bind the consumer or whether this contract is enforceable. However, there are court decisions that support enforceability of shrink-wrap contract.

In *ProCD, Inc. v. Zeidenberg*, there is issue whether the license in the package makes customer comply with it. This license could be found in the box of the software and it appears

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<sup>19</sup> Mo, Zhang. (2007)

<sup>20</sup> Clapperton, Dale & Stephen Corones. Unfair Terms In Clickwrap and Other Electronic Contracts. 2007. <http://eprints.qut.edu.au/7650/1/7650.pdf> (visited 20 October 2012)

<sup>21</sup> Davidson, Alan. The Law Of Electronic Commerce. Cambridge University Press. pp.67



on the computer screen when consumer tries to use the software. In that case court thought that consumer has an opportunity to review the terms of license, if consumer does not satisfy with it, he/she may refuse to use the product and do not agree to terms on the screen<sup>22</sup>. But, consumer must have a chance to review those terms before payment process in order to be deemed that they agree to enter into contract. If the consumer bind to terms of contract as the court has ruled, this policy would make wrong reference to another case which is subject to choice of clause in shrink-wrap contracts. Because, parties have to be clearly informed upon choice of clause in order to bind with it before enter into contract, otherwise it shall not be subject to consent which given to other terms of contract.

In *Hill v. Gateway 2000 Inc.*, license which stipulates arbitration clause was put in the box of computer and the legal question whether the arbitration clause is assented along with the whole terms inside the box. The court emphasized the duty to read the terms of contract that requires customers to read them and decide whether they agree to enter into contract. When they do not satisfy with the terms, they should reject the product and return it<sup>23</sup>. Thus, it seems that court did not treat arbitration clause as separate part of the license. Obviously, the court deemed withdrawal of product as free bargain on terms of contract. However, this type of contracting does not give any chance to consumer to decide whether to buy the product or not, because money now terms later characteristic of the contract. When the court support the enforceability of the contract, it is necessary to treat choice of law clause as separate part of the contract, because it requires consumer to expressly agree this term of the contract. Consequently, those cases show that courts requires consumers to read the terms and give their final decision to reject the terms by returning the product or give their assent to terms of the contract by using the product. But, the terms of the contract must be reviewed by parties before payment process in order to stipulate duty to read policy. In that case, consumer does not be given any opportunity to review the terms, because they can only review them after receiving product. In fact, court drew the extent of giving assent to contractual terms which is still controversial issue in the context of international private law.

On the other hand, in *Step-Saver Data Systems, Inc. v. Wyse Technology*, package of computer program has a notice which stipulates a given assent to terms of contract including warranties rules by opening the package. In this case, main question is whether additional terms (warranties provisions) constitute assent to bind consumers by opening the package.

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<sup>22</sup> Grusd, Brandon L. Contracting Beyond Copyright: *ProCD, Inc. v. Zeidenberg*. 1997.  
<http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech353.pdf> (visited 05 November 2012)

<sup>23</sup> United States Court of Appeals For the Seventh Circuit . 105 F.3d 1147 (7th Cir. 1997).  
<http://cyber.law.harvard.edu/ilaw/Contract/hill.htm> (visited 05 November 2012)

Court ruled that the given assent to the terms on the package could not be imposed on the additional terms, because assent is given to terms on the package which is not clear enough to stretch it to the additional terms<sup>24</sup>. It shows that buyers can only give consent to terms that they are able to review them clearly.

In *Klocek v. Gateway, Inc.*, terms and condition has sent into box of computer which includes arbitration. Those terms stated that if consumer keeps the product more than five days, it stipulates the assent to contract. The main issue is whether the arbitration clause is subject to assent that is given to terms and condition of contract. The court decided that arbitration clause is not the part of contract so consumer must expressly give assent to this term and court indicated that five days condition could not be deemed as given consent to enter into contract<sup>25</sup>. This case is one of the most important example that emphasizes the party autonomy in contract especially in choice of law by considering arbitration clause as a part of contract which requires clear assent on it in order to be enforceable.

As it is seen from two different results of the shrink wrap contract, enforceability of shrink-wrap contract is highly controversial even if it is legally enforceable. In fact, merchants take advantage on legality of this contract by stipulating choice of law clause in order to keep their commercial interest in a strong level. Thus, it is necessary to set some limits on enforceability of choice of clause in order to increase consumer protection against this kind of contract which is based on take it or leave it basis.

### **3.1.1 Choice of Law in Shrink-Wrap Contracts**

The enforceability of those contracts has been commonly accepted, but it does not mean that the shrink-wrap contract complies with traditional rules of contract formation in the context of party autonomy. In fact, all terms of contract become enforceable when consumers or users are deemed to give assent to get involved in transaction. At this point, choice of law debates have been arising upon whether the choice of law clause is enforceable along with the contract itself. Thus, it is important to analyze this issue in line with party autonomy, because choice of law clause may not be valid if the parties do not comply with freedom of contract and mutuality.

The party of contract must be informed well by another party upon all terms of the contract in question. Because, parties are supposed to know what kind of terms they are

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<sup>24</sup> United States Court of Appeals for the Third Circuit. 939 F.2d 91. 1991.  
<http://cyber.law.harvard.edu/metaschool/fisher/contract/cases/step.htm> (visited 04 November 2012)

<sup>25</sup> U.S. District Court. 104 F. Supp.3d 1332. 2000.  
[http://www.internetlibrary.com/cases/lib\\_case209.cfm](http://www.internetlibrary.com/cases/lib_case209.cfm) (visited 06 November 2012)

offered in order to negotiate them freely. As it seems in case law, users/buyer were not able to review the terms before entering into contract and they have been only noticed that terms would be enforceable when they open the package or use the software. In that case, choice of clause in the subject contract which is put into box or embedded into software must have been informed to customer by merchant before entering into contract in order to hold consumers liable for possible effect of governing law of the contract.

On the other hand, consumers or users are considered to give consent to contract if they do not withdraw the product. In that case, they only give their consent to contract itself rather than all terms of contract such as choice of law clause. Thus, parties must be in the position to review terms of contract and give their consent to contract along with the all terms of it. In context of shrink-wrap contract, consumers could only give assent to terms that they can review. In fact, consumers are not aware of the existence of the choice of law clause before opening the package or using the software so it is not reasonable to consider consent given to it.

As a result, consumer would face with aggressive commercial activity without having any given opportunity to know what kind of liability they would undertake by entering into contract.

### **3.2 Browse-Wrap Contracts**

It is kind of contract which users/consumers enter into contract without giving explicit consent upon terms of the contract<sup>26</sup>. In that case, the terms of contract is embedded into website and consumer has a chance to review them, however it is not conditional for entering into contract. When consumer gets involved in online transaction such as downloading, it is optional to review the term and condition relating with transaction so consumer needs to decide to read those terms before agree to do the transaction which would be deemed as given consent to those terms by courts. In fact, when type of behavior for ordinary consumer is considered, it is obvious that the most of consumers do not aware of the importance of the terms and condition of contract so they have been entering into transaction without reading the terms. At this point, duty to read policy arises which stipulates the responsibility of consumer to read the terms of contract before entering into contract. If consumer enters into contract without performing this duty, they would be considered as agree to enter into contract by accepting every kind of result of the contract. However, it is not always possible to know the existence of terms and conditions on the webpage due to lack of transparent designs of the

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<sup>26</sup> Davidson. p. 70

web page which aims to distract consumers from reviewing the terms. In fact, it sometimes becomes decisive factor in lawsuit whether terms of browse-wrap contract are enforceable.

The design of the webpage has been emphasized in *Pollstar v. Gigmania Ltd.* to ascertain whether there was breach of contract. Pollstar webpage was designed in a way of obscure by noticing the terms and condition in small print without underlining it or using noticeable color. In that case, the main question is whether user may be held liable to breach of contract even if user does not review the terms due to distracting design of the webpage. The court pointed the important point in this decision by dismissing the claim of plaintiff in the context of breach of contract that users are not aware of the existence of the contract<sup>27</sup>. Therefore, it shows that notice upon terms and condition is important criteria to hold the users liable for the possible result of the contract such as breach of the contract.

Furthermore, in *Specht v. Netscape Communications Corp.*, when consumers download the software that related the main communication product, they become the subject of license agreement that includes arbitration clause. Also, term and condition could be seen when users scroll down the page and click to open another page. In this situation, the main issue is whether the consumers could be bound with this arbitration clause. Court stated that *'Netscape's navigator will not function without a prior clicking of a box constituting assent. Netscape's SmartDownload, in contrast, allows a user to download and use the software without taking an action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed'*<sup>28</sup>. It shows that court was deemed it necessary to expressly agree to terms and conditions which fit party autonomy in ways of clarity of terms and consent upon terms if party satisfies with it. Also, the judge comment in *Ticketmaster Corp v Tickets.com Inc.* emphasizes the behavior of consumer upon reading terms of contract in a way that many customers instead are likely to proceed to the event page of interest rather than reading the small print. *'It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with anyone using the web site'*<sup>29</sup>.

It has been showed that consumer is not aware of the terms and conditions on the webpage so it is not reasonable to bind them with those terms including choice of law clause.

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<sup>27</sup> United States District Court For The Eastern District Of California. 170 F. Supp. 2d 974. 17 October 2000. <http://euro.ecom.cmu.edu/program/courses/tcr840/2003/pollstar.htm> (visited 22 October 2012)

<sup>28</sup> United States District Court For Southern District of New York. 150 F. Supp. 2d 585. 2001 <http://www.internetlibrary.com/pdf/specht%20district%20court.pdf> (visited 22 October 2012)

<sup>29</sup> U.S. District Court, Central District of California. 27 March 2000 <http://web.archive.org/web/20020605075835/http://www.gigalaw.com/library/Ticketmaster-tickets-2000-03-27.html> (visited 22 october 2012)

At this point, the question arises how the notice to indicate terms and conditions would be adequate. Also, another point is whether choice of law clause would bind consumer even if the terms and condition has indicated as adequate notice.

In *Hubert v. Dell Corp*, terms and condition that includes arbitration clause is accepted when consumer buys computer by using defendant's webpage. Also, those terms and conditions are embedded into webpage and it does not require consumers to click any place to agree to be bound with it. Plaintiff pointed out the terms and condition by using blue hyperlinks into webpage. The main issue in this case is whether the notice for terms and conditions constitutes requirement to inform consumer clearly on terms and conditions. The court indicated the adequacy of blue hyperlink notice by saying that '*the hyperlink's contrasting blue type makes it conspicuous*'<sup>30</sup>. However, it is necessary to inform consumer well upon choice of law clause in order to consider consent is given this term as well. Also, notice of choice of law clause trigger other issue to ascertain the extent of consent in US called unconscionability which tests the awareness of consumer upon terms of contract.

Consequently, the main debate has been arising from enforceability of browse-wrap contract is based on the awareness of consumers upon the existence of terms of contract on the webpage. In that case, it has been mainly taken as a consideration how notice must be presented. Obviously, it has been tested on case by case basis by considering design of webpage and average consumer characteristic.

### **3.2.1 Choice of Law and Browse-Wrap Contracts**

The parties must know whether there is a choice of law clause into contract before entering into contract in order to decide to get involved in transaction. Along with the fact that choice of law clause are not considered as separate part in the context of enforceability of the contract, choice of law clause must be informed explicitly as if it is separate subject from contract itself in order to be held the party (consumer in the context of browse –wrap contract) liable to comply with choice of law clause into contract.

As it is seen in case law upon browse-wrap contract, consumer has been tried to be held liable for choice of law clause when online merchant embedded terms and condition into webpage by giving notice. This notice represent a consent that is given to contract if consumer has done the transaction on the webpage. In that case, there are two discussion have been arising whether the notice is presented on somewhere of the webpage constitutes consent

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<sup>30</sup> Appellate Court of Illinois, Fifth District. 02-L-786. 2005.  
<http://www.state.il.us/court/opinions/appellatecourt/2005/5thdistrict/august/html/5030643.htm>(visted 24 October 2012)

upon contract. When the first question is answered in positive way, another discussion arises whether the consent is given to contract can be applied to choice of law clause. Obviously, it has been accepted that consumer is deemed to give his/her assent to contract if notice is presented in a way of bringing consumer's attention on it such as notice with blue hyperlinks.

At this point, the second question comes into the center of the discussion. First of all, choice of law clause must be clearly presented into contract so that consumer considers this term of the contract that affects contractual obligations when they agree to get involved in transaction. In that case, choice of law must be noticed explicitly rather than hiding it into the text, because consumer would have difficulty to understand and follow the terms of the contract while they review the terms by clicking hyperlink. However, parties have to know what kind of terms they agree to be bound. Obviously, consumers are not aware of the choice of law clause due to distracting style of drafting contract even if they click the hyperlink to review the terms of the contract.

When consumers completed the transaction such as downloading, they considered to give their consent to contract and all terms of it. In the context of party autonomy, the consent is deemed to be given to whole contract, if parties are informed every terms of the contract. In browse-wrap contract, consumers are only informed upon the existence of the contract itself by hyperlink on the webpage. Therefore, it is not reasonable to be held consumer liable for the result of choice of law clause, because this clause is not point out explicitly into the text. For this reason, the policy which aims to enforce the choice of law clause on the basis of given consent to contract, does not fulfill the requirement of party autonomy in the context of mutuality. Because, mutuality requires parties give their consent to terms of the contract which they are clearly informed.

### **3.3 Click-Wrap Contracts**

In a 'clickwrap' license, the terms of the license are presented to the user electronically, and the user agrees to the terms of the license by clicking on a button or ticking a box labeled 'I agree' or by some other electronic action<sup>31</sup>. In this type contract, consumer has a chance to review the terms which is presented before payment process and they indicate their consent by clicking on agreement section. In that case, the main issue is whether assent is given to contract could be deemed to be valid to all terms of contract. Because, it is obvious that terms into small box and drafted too long or into distracting way may make consumer not

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<sup>31</sup> Herman, Gabriel. Internet Contracts: A History of Browse-Wrap Contrates and Click-Wrap Contrates. [http://students.washington.edu/wulr/archive/Fall\\_2010/Herman.pdf](http://students.washington.edu/wulr/archive/Fall_2010/Herman.pdf) (visited 20 October 2012)

to read them. However, there is no doubt on the enforceability of click-wrap contracts which is formed by consumer consent, however it is still controversial whether the consent is given to every terms of contract especially choice of law clause.

In *Steven J Caspi v Microsoft Network*, the court indicated that Plaintiff is not bound by the forum clause would be equivalent to holding that *'they were bound by no other clause either, since all provisions were identically presented'*<sup>32</sup>. Obviously, court emphasize the duty to read policy in this case, because terms of contract is presented before entering into contract and consumer has a chance to review them. However, it gets complicated when the issue comes to choice of law, because consumer is not in the position to understand complicated terms that is drawn by merchant. In fact, it is difficult find out the choice of law clause for consumer while they are reviewing the terms due to distracting design of the contract. It is necessary to point out this clause of the contract clearly in order to comply with party autonomy, because consumer has only chance to negotiate the terms by reviewing them and click to agree or leave it.

The enforceability of click-wrap contract has been discussing in the context of unconscionability policy along with the style of drafting contract. The court and intervener has discussed whether enforceability of arbitration clause is enforceable in *RealNetworks, Inc. Privacy Litigation*. Intervener claims that *'the arbitration provision does not provide fair notice because it is "buried" in the License Agreement. Although burying important terms in a "maze of fine print" may contribute to a contract being found unconscionable, the arbitration provision in the License Agreement is not buried'*<sup>33</sup>. Also, intervener pointed out another aspect that style of drafting contract distracts reader to understand the terms because it has been drafted small print and presented in to small box which does not give users to print it out and read carefully. In that case, it has been indicated that terms of contract must be clear to present the liability of the parties and result of the contract after entering into contract. Also, intervener tried to refute the claim that supports enforceability of click-wrap contract including arbitration clause by considering traditional contract making principle. However, the court refuse to the claim of intervener on the basis that terms of contract have been presented before entering into contract and it provide users an opportunity to review<sup>34</sup>.

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<sup>32</sup> Superior Court of New Jersey, Appellate Division. 732 A.2d 528. (1999)  
[http://scholar.google.com/scholar\\_case?case=1457299661327438830&q=323+N.J.+Super.+118&hl=en&as\\_sdt=2002](http://scholar.google.com/scholar_case?case=1457299661327438830&q=323+N.J.+Super.+118&hl=en&as_sdt=2002) (visited 01 Novemner 2012)

<sup>33</sup> United States District Court, N.D. Illinois, Eastern Division. 00 C 1366. 2000  
<http://www.internetlibrary.com/pdf/In-re-RealNetworks-N.D.-Ill.-May-8-2000.pdf> (visited 01 October 2012)

<sup>34</sup> Ibid.



Therefore, there is no unconscionability in the context of arbitration clause and users has a duty to read all terms of contract before entering into contract.

Also, the same aspect has been pursued in *Feldman v. Google, Inc.* but court emphasized interesting point in this case while analyzing unconscionability. The plaintiff has claimed that there is not an adequate notice to point out the choice of forum clause which stipulate that “*The Agreement must be construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and adjudicated in Santa Clara County, California.*” and it is provided that “***Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.***”<sup>35</sup> In that case, plaintiff who is a lawyer, claimed terms of the contract are difficult understand and follow in context of drafting style. However, court ruled that adequate level of notice has been presented to bring users attention upon the terms of contract and the profession of the plaintiff has taken an account to decide whether the terms is difficult to understand. Obviously, the decision of the court shows that even if click-wrap contract has been enforceable, it would be depend on the nature of the case, it is to say that enforceability of those contract could be differ in case by case basis.

As a result, it is obvious that click-wrap contract do not comply with party autonomy in some way that some terms are not pointed out clearly which are deemed as a subject to consent given to whole agreement by courts. On the other hand, this contract fulfills the party autonomy in comparison with others in the context of a chance to review the terms and a chance to give consent to bind with contract freely by clicking the I agree section before entering into contract.

### 3.3.1 Choice of Law and Click-Wrap Contract

In traditional contract formation principle, the parties must have a chance to review the terms of contract which are supposed to be clear to understand. Afterwards, they expressly agree to enter into contract if they are content with terms. In click-wrap contract, choice of law clause is drafted into text of the contract and it is considered that consumers agree to be bound by this term when they click ‘I agree’ section on the box of the text. At this point, the discussion arises whether the consumer give consent to choice of law clause.

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<sup>35</sup>The United States District Court For The Eastern District Of Pennsylvania. 06-2540. 2007  
[http://www.gpo.gov/fdsys/pkg/USCOURTS-paed-2\\_06-cv-02540/pdf/USCOURTS-paed-2\\_06-cv-02540-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-paed-2_06-cv-02540/pdf/USCOURTS-paed-2_06-cv-02540-0.pdf)  
(visited 01 October 2012)



In fact, there is no doubt about enforceability of contract when consumers go through clicking procedure, however choice of law clause is not indicated clearly due to lack transparency of the contract. Because, online merchants usually draft to the contract by hiding the choice of law clause into text in a way of using small print of letter. In that case, consumers are supposed to have profound knowledge on legal field to understand the contractual obligation on the basis of choice of law. It is not possible to perform mutuality when party knows every contractual obligation while other does not have any idea about it. In fact, consumers do not have any intention to agree choice of law clause when they click to 'I agree'. Therefore, it is not reasonable to consider that consent is given to contract along with the choice of law clause in it.

Consequently, the choice of law clause must be presented in clear and noticeable way into the text of contract in order to clarify consumer's vision to show what kind of obligations they would undertake. However, court decisions support the present situation in which online merchant prefer to hide choice of law clause into text of the contract. Obviously, it does not fulfill the requirement of party autonomy.

### **3.5 Consumer Protection Aspect in Wrap Contracts**

Consumers could not properly use bargaining power as it is required in party autonomy principle due to lack opportunity to review the unclear terms of the contract. Thus, they give consent to contract without knowing what is offered such as choice of law. The choice of law clause is the most important term of the contract, because it effects what is stipulated into contract. As it is seen from the case law of wrap contracts, choice of law clause is considered the subject to consent that is given to contract which means that this term is not deemed as separate part of the contract when the issue comes to enforceability of it.

The lack of party autonomy in choice of law causes unequal bargaining power in wrap contracts. For this reason, merchant may take an advantage of one-sided autonomy to impose the governing law on the contract which is most favorable to them. Obviously, it throws consumer into the weakest position in commercial environment by supporting the enforceability of choice of clause without requiring explicit notice on it. Basically, consumers are not in the position to understand complicated terms in wrap contract which let merchant to misuse this change on the basis of their business interests.

It is obvious that style of drafting wrap contracts and the court decisions that support this style, harm the weaker party (consumers) of the contract in the context of choice of law. In order to increase the protection of consumer rights, it is necessary to set some limits upon

enforceability of choice of law clause in wrap contracts. Therefore, some limits has been imposed on this issue in the context of consumer protection, however those limitations has been controversial whether those rules provide efficient solution on these problems.

## **4 US and EU Choice of Law Approach and Solutions**

The lack of party autonomy in wrap contracts causes legal dysfunction to protect consumer rights in the context of choice of law. The nature of wrap contract, namely standard contract in the EU and adhesion contract in the US is based on the party autonomy which is drafted by one party (merchant or business). In fact, it provides merchant with an advantage to choose the governing law which may not have efficient consumer protection principle. In that case, it is necessary to limit the choice of law in wrap contract, in order to protect consumers as weaker party of the contract from the chosen law that weakens the consumer rights. However, the extent of limitations must be explicit in order to avoid divergent court decisions on the same subject matter.

The efforts to limit party autonomy in choice of law have been taken in variety of way on the basis of protecting specific interests in both the US and the EU. However, those are in doubt to be applied to the contracts in e-commerce, because the limitations have been imposed on the type of contract which is drafted in traditional way. Thus, it is important to test as to what extent the traditional rules of choice of law must be applied to e-commerce in order to analyze how consumer rights may be protected against the chosen law by one party. Therefore, it would be helpful to analyze the US and the EU rules which have different principle of conflict of law in the context of consumer protection, in order to ascertain to what extent those rules provide solution for unfair practice in wrap contracts.

### **4.1 Choice of law and Consumer Protection in US**

The early principles of US legislation on conflict of law were restrictive in a way that parties were not provided any right to choose the governing law of the contract<sup>36</sup>. Afterwards, the restrictive policy has been revised due to criticism over lack of party autonomy in choice of law principle, because the party autonomy is important criteria to provide efficient consumer protection, especially in e-commerce. The Second Restatement of Conflict of Law (1969) has been implemented which respects to part autonomy in choice of law, however it sets some limitations, such as public or state interest and significant relationship or connection criteria, which require some test to ascertain whether the chosen law is enforceable.

In fact, recent technological development disregards the applicability of those rules into e-commerce so UCC and UCITA have been drafted in order to deal with the recent

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<sup>36</sup> O'Hara, Erin Ann & Larry E. Ribstein. Conflict of Law and Choice of Law. 1999.  
<http://encyclo.findlaw.com/9600book.pdf>

development. Because, each country or states has their own interests to evaluate whether the choice of law clause evade their public or state policy so each country wants to apply their rules to contractual disputes<sup>37</sup>. In consideration of international aspect of the internet, it is almost impossible satisfy each country' interest by implementing public or states interest requirement in choice of law. Also, it is difficult analyze significant relationship criteria in e-commerce, because the internet lets parties to conduct each step of contractual relationship in different part of the world. However, the functionality of those legislations is still in doubt in the context of consumer protection in e-commerce. Thus it is necessary to analyze as to what extent those legislations fit into e-commerce in order to ascertain whether they provide effective consumer protection.

#### **4.1.1 Historical Development and Philosophical Approach in US**

In early development of choice of law in the context of party autonomy was based on the strict limitation on party autonomy for choice of law. Because, it has been suggested that parties may have legislative power if party autonomy principle is established in choice law and as Professor Joseph Beale, the reporter of the First Restatement of Conflict of Laws said that "[t]he fundamental objection to this in point of theory is that it involves permission to the parties to do a legislative act."<sup>38</sup> Obviously, this comment shows the main approach of the First Statement on party autonomy in choice of law. Therefore, criticism has begun to arise on the center of the necessity of modern and objective approach on choice of law in line with party autonomy.

The restrictive approach on choice of law has been amended by the Second Restatement of Conflict of Law which has been drafted in line with party autonomy along with some limitations on it. Section 187 stipulates the limitations on party autonomy in choice of law that 'substantial relationship' to parties and transaction or 'reasonable basis' for choice under the fundamental policy of the state analysis<sup>39</sup>. It has been criticized in a way of being so complicated and complex.

Section 187 requires analysis of relationship between chosen law, parties and transaction and then public policy assessment of different subject states while court tries to find out whether choice of law clause is enforceable. Firstly, in the context of analysis upon substantial relationship, there are some method has been refer to ascertain whether chosen law

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<sup>37</sup> Rosenblatt, Betsy. Principles of Jurisdiction.

<http://cyber.law.harvard.edu/property99/domain/Betsy.html> (visited 14 November 2012)

<sup>38</sup> Zhang, Mo. (2008)

<sup>39</sup> The US. Restatement Second of Conflict of Law. sec 187

meets the requirement in section 188. However, it does not fit into e-commerce at some level when place of contract, negotiation and performance. In fact, offer (related with place of negotiation) and acceptance (related with place of contract) would be performed in different states in online environment so it is not effective method anymore to consider significant relationship in e-commerce as it is in traditional commerce. In addition, there is a statement to show the extent of inadequacy of those method in the comments on section 188 that *'the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip'* and *'This contract is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.'*<sup>40</sup>

The same problem could be seen in place of performance method that businesses could fulfill different part of the performance in different states such as 'creation of the product, uploading the product, employing relevant software to enable the automatic delivery'<sup>41</sup>. In that case, this method lose its importance as it has been suggested in the comment on sec.187 that *'the place of performance can bear little weight in the choice of the applicable law when performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue'*<sup>42</sup>. This comment emphasizes the deficiency of general rules in a way that those rules could not be applied to dispute in e-commerce which provides parties to conduct the transactions in different place on the internet.

Consequently, the method of reasonable basis to test enforceability of choice of law does not serve efficient protection for consumers, because it puts the courts in confusing situation to deal with analysis that requires evaluating the places in which step of contract formation has been conducted. Obviously, it is hard and time-consuming process to follow for courts in the context of contracts in e-commerce. Thus, courts may use their high level authority to simply refuse to apply parties' choice and apply forum law to dispute without considering whether the forum law provides effective consumer protection.

On the other hand, court has to analyze the statutes of different states, sometimes multiple states, in order to reach final decision whether chosen law would be enforceable by considering greater interest. In that case, Court has the consider states statutes in question

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<sup>40</sup> The American Law Institute. Validity of Contract and Rights Created Thereby. 1971.  
<http://www.kentlaw.edu/perritt/conflicts/rest188.html> comment on sec 187

<sup>41</sup> Tang, Zheng Sophia (2009) p.235

<sup>42</sup> The American Law Institute. (1971)

which one of these provides more protective provision on subject matter. In fact, it is too much burden on the court to follow this process. When the international consumer contract is the subject matter, court has to consider foreign law which is too difficult court to compare foreign law and its own law to find out which one has greater interest upon consumer contract. Thus, the method of great interest does not provide efficient solution on consumer contract in the context of choice of law, because the courts are not in the position to get involved in cross-border legal analysis which requires high level of legal expertise.

As a result, traditional methods to test the enforceability of choice of law clause do not fit into the technological advancement in a way that it is hard to do cross-border analysis for ascertaining whether states' interests are affected or reasonable relationship is exist between transaction and parties due to the global nature of internet transactions. In order to solve existing confusion and unpredictability of rules on consumer protection and choice of law, especially in ecommerce there have been some efforts to regulate this issue which are UCC (Uniform Commercial Code) and UCITA (Uniform Computer and Information Transaction Act).

#### **4.1.2 Uniform Commercial Code Approach**

UCC has been drafted with respect to party autonomy in choice law by stating that '*an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.*'<sup>43</sup> In this section, it provides international transaction distinction and not to require any relationship between chosen law, transaction and parties in general in comparison with Second Restatement. However, it sets some rules in the context of choice of law for consumer related contracts which put the consumer transactions out of the general concept.

In section 1-301(e) limits the party autonomy on the purpose of consumer protection that applicable law for consumer contract is '*the state or country in which he consumer principally resides*'<sup>44</sup> unless as it stated subparagraph B; consumer performs to enter into contract and receive delivery in same country or state where will be the law of the contract even if consumer is not reside there. At this point, UCC does not require any assessment of relation, but it set the requirement of relationship between chosen law, parties and transaction. In the first subparagraph, an efficient provision has been provided for consumer protection by

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<sup>43</sup> Uniform Commercial Code .2001. sec. 1-103

<sup>44</sup> Ibid.

letting consumer to get involved the law which they are familiar with and also preventing business from choosing the law which provide them an advantage to pursue their commercial interest. From this way, the precaution is taken against the lack of party autonomy in electronic contracts. Therefore, this provision fulfills the purpose of protecting weaker party of the contract by limiting the parties' choice.

However, second subparagraph would not fulfill the purpose to protect consumer rights in e-commerce, because consumer could simply enter into contract and download some software within short time while he/she is traveling. In that case, consumer would not possibly know to what extent this country's law provides protection at the time of contract making. In fact, the purpose of limiting choice of law for consumer contract must to take a role to provide consumer better protection by giving them a chance to deal with the law of the place that they are familiar with. Because, party autonomy which fulfill this purpose, has not been provided in wrap contracts. Obviously, the second subparagraph does not aim to provide solution for consumer protection that compensate for the absence of party autonomy in wrap contracts.

Also, section 1-301(f) stipulates the exception of consumer protection provision in line with fundamental policy of the state or country whose law would be applied in the absence of choice<sup>45</sup>. It would be challenging for court to analyze to what extent the law of the foreign country provides consumer protection when the issue comes to analysis of fundamental public policy. This provision increases the unpredictability worries; because it provides profound authority to court for deciding if it affects the fundamental policy which has not been described explicitly. In fact, the predictability of provisions which is embodied into choice of law issue is the one of the important requirement of efficient conflict of law which has emphasized by Dean Prosser; *"[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it."*<sup>46</sup>

Therefore, UCC does not substantially improve the applicability of choice of law rules into e-commerce because of the difficulty to ascertain applicable law for the cross-border contract in online environment in context of unpredictable and complex nature of

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<sup>45</sup> Uniform Commercial Code .2001

<sup>46</sup> Graves, Jack M. Part Autonomy in Choice Of Commercial Law: The Failure of Revised UCC Section 1-301 and a Proposal for Broader Reform.  
<http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1383&context=scholarlyworks>  
(visited 19 November 2012)

legislations<sup>47</sup>. In general, choice of law rules must be implemented for e-commerce in a way of clarifying and simplifying the method to test whether choice of law clause decrease the level of consumer protection. The general provision of UCC for consumer contracts provides clear way to protect consumers in comparison with Second Restatement, but it still require relationship requirement and public policy principle.

On the other hand, there has been another method to test the enforceability of choice of law clause besides fundamental policy of state and the place of consumer resides which is called unconscionability. It is also controversial to provide efficient solution in e-commerce.

#### **4.1.2.1 Unconscionability Doctrine**

This doctrine tests to the enforceability of contract or clause that is stipulated into Section 2-302 of UCC. It has not been described explicitly about what makes contract or clause unconscionable. Some criteria have been given in Section 2-302/1 that the contract or clause could only be subject to unconscionability doctrine ‘at the time of it was made’<sup>48</sup>. It means that parties must be aware of the contractual obligation and results while they enter into contract. Also, this doctrine aims to protect parties’ right from the possible result of the unconscionability as it is stated in same section. The Official Comment of UCC on Section 2-302 has tried to clarify the concept of it in order to guide courts, because courts are given a burden to analyze whether the contract or clause is subject to the doctrine. It pointed out two issues which describe the extent of unconscionability doctrine; ‘*the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.*’ and ‘*the principle is one of the prevention of oppression and unfair surprise...*’. The comments emphasize the content of the doctrine on the basis of the bargaining power; however, it does not provide any specific method to test whether contract or clause is enforceable.

Due to lack of explanation upon unconscionability doctrine in UCC, Arthur Leff has been suggested to analyze it into two contexts that the first one is based on ‘the quality of assent’, namely procedural unconscionability, and second one is ‘fairness of the resulting terms’ that is called substantive unconscionability<sup>49</sup>.

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<sup>47</sup> Wang, Faye Fangfei. Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China. Cambridge University Press. 2010. pp.131

<sup>48</sup> Uniform Commercial Code .2001. Section 2-302

<sup>49</sup> Hillman, Robert A. & Jeffrey J. Rachlinski. Standart Form Contracting In Electronic Age. 2001.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=287819](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=287819) (visited 18 November 2012)



Procedural unconscionability is based on the way of drafting the contract and the extent of assent is given to contract. The Official Comment supports this theory by emphasizing ‘unfair surprise’ in the text<sup>50</sup>. It means that parties must have change to review the terms of contract at the time of making contract and give consent to those terms in order not to face with any unfair surprise that is embedded into contract. However, as it is seen from case law on the enforceability of wrap contract, there have been divergent decisions due to nature of the contract in e-commerce. In fact, electronic contracts are based on the one-sided autonomy which includes the choice of law clause and this term of the contract is obviously procedurally unconscionable due to lack of equal bargaining power and type of distracting design of it<sup>51</sup>. Thus, courts are hesitate to strike down the choice of law clause without detecting substantive unconscionability, because the nature of electronic contract would require to strike down the enforceability of e-contracts in the context of procedural unconscionability.

The results of the terms of contract are considered in the context of substantive unconscionability doctrine. This doctrine has been indicated by the words, ‘oppression’ and ‘one-sided’, in Official Comment of UCC<sup>52</sup>. It shows that term of the contract would be strike down, if the terms provide unfair and oppressive result to other party, especially in the contract of one-sided autonomy. In the context of this doctrine, it is difficult to refuse the enforceability of choice of law clause, because court is supposed to analyze the fairness of the term itself rather than possible effect of applicable law<sup>53</sup>. In fact, court could only consider why business applied the choice of law rules into contract when it tests the substantive unconscionability. As it is seen from the case law, businesses prefer to apply to law of country or state which they are familiar with, in order to keep their commercial interest in good level. This reason has not been considered to be subject to substantively unconscionability, because this doctrine does not let courts to focus on the impact of applicable law to ascertain whether the consumer rights would be affected along with the impact of the contract itself by applicable law.

Consequently, unconscionability doctrine has failed to provide solution on recent consumer protection problems in the context of choice of law in e-commerce as it could be observed from the case law. But, it is possible to increase the efficiency of this doctrine by

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<sup>50</sup> McLaughlin, Gerald T. Unconscionability and Impacticability: Reflections on Two U.C.C. Indeterminacy Principles. 1992. <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1244&context=ilr> (visited 19 November 2012)

<sup>51</sup> Tang, Zheng Sophia (2009)

<sup>52</sup> McLaughlin (1992)

<sup>53</sup> Tang, Zheng Sophia (2009)

dividing the test of the substantive and procedural unconscionability in means of interoperability requirement. Therefore, procedural unconscionability would effectively deal with the lack of party autonomy in wrap contracts, because it deals with the problem upon information duty and consent as a result of equal bargain.

#### **4.1.3 Uniform Computer Information Transaction Act (UCITA)**

UCITA has been drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in order to establish specified rules on computer and information transaction which has not been specifically stipulated in UCC. Also, it regulates contractual relationship in e-commerce such as choice of law clause in electronic contracts. However, it has been criticized due to its nature that bias on the business and licensor<sup>54</sup> so it has not been adopted any other states besides Maryland and Virginia.

Party autonomy in choice of law has been implemented in Section 109 of UCITA by letting parties to choose the governing law in their contract. But, wrap contracts which have been enforced by UCITA, do not let party to negotiate the applicable law for contract. In section 112, traditional duty to read has been emphasized in a way that party would be deemed to give consent if they have 'opportunity to review' the terms<sup>55</sup>. In that case, consumer has to read the terms when they have a chance to review it, otherwise they are considered to be aware of those terms and accept to be bind with it. Thus, if consumer has a chance to review the terms and has a disclosure of terms is presented before payment or get delivery, then take any step to show intention or authentication, those processes represent the assent<sup>56</sup>. It shows that UCITA has implemented the party autonomy in choice of law; however it enforces the wrap contracts which contradict the requirement of party autonomy. On the other hand, UCITA does not provide any solution so as to ascertain to what extent party is considered have an opportunity to review terms or what constitute the adequate disclosure<sup>57</sup> as it has been seen in case law as a problem to ascertain whether wrap contract or terms in it are enforceable. Also, UCITA stipulates the tests of enforceability of the wrap contract such as unconscionability and fundamental policy of state or reasonable relation which have not been adequate to clarify the applicability of the test. Consequently, UCITA does not provide any efficient consumer protection against wrap contracts in the context of party autonomy.

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<sup>54</sup> Zhang, Mo. (2007)

<sup>55</sup> Uniform Computer and Information Transaction Act. Sec 112

<sup>56</sup> Denny, William R. & Anderson, Potter. Overview of UCITA. 2005.

<http://euro.ecom.cmu.edu/program/law/08-732/Transactions/UCITAOverview.pdf> (visited 19 November 2012)

<sup>57</sup> Mo, Zhang (2007)

However, there are some limitations in the context of consumer contracts which chosen law is not enforceable if it disregards the consumer rule of the country or state which would apply in the absence of choice. At this point, the main concerns have been arising on the basis of consumer protection, because the rules that stipulates applicable law of state or country in the absence of choice, is mainly based on the place of the business. In section 109/b-1 and 2, it is stated that *'An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor is located when the agreement is made.'* and *'delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.'*<sup>58</sup>

In fact, the recent electronic transactions are usually based on the delivery of intangible goods such as software and e-books etc. so the first subparagraph of section 109/b is more possible to be applied to e-commerce transaction in the case of recent development in technology. In that case the question arises as to how the rules of licensor' states or country would provide more efficient protection for consumer than the rules of the consumer' country does. Because, consumers should be familiar with the rules for consumer protection so as to understand to what extent he/she will have responsibility in line with terms of contract, at time of contract making. It is the basic requirement of equal bargaining power that parties must know what they are bargaining for. For example, when consumer buys an e-book from the web page that is operated in US where UCITA has been adopted, consumer would not possibly know what kind of result he/she will face after entering into contract, because consumer does not familiar with the subject law. On the other hand, consumer would have a difficulty to defend his/her rights properly without being familiar with it. William J. Woodward, Jr. has described the situation by saying that *'the rule will disadvantage licensees who may have no practical way of determining what the effect of a particular non-related choice may have on the legal rules applicable to a transaction'*<sup>59</sup>.

Consequently, UCITA has been criticized due to lack of consumer protection policy as it is obvious in the context of party autonomy and choice of law, because, it is prone to apply the policy that is based on the application of forum law and law of the business' place. In fact, consumer needs to use their autonomy for choice of law or protection rules of their own country or states to deal with aggressive commercial practices of wrap contracts; however

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<sup>58</sup> UCITA section 109

<sup>59</sup> New Jersey Law Revision Commission. 2000.

<http://www.lawrev.state.nj.us/ucita/M000214a.pdf> (visited 19 November 2012)

UCITA forces to apply to law of the business' place for consumer contracts without considering law of consumers' country. As a result, in order to deal with the problems which are caused by the rules of UCITA, the legislations which is against it, have been implemented in many states. Also, many consumer organizations have been trying to increase the awareness of possible threat by UCITA so as to stop further implementation of it.

## **4.2 EU Choice of Law Approach and Consumer Protection**

In the early stage, Rome Convention has been accepted as a guide to all member states in the context of conflict of law. It was drafted to regulate traditional legal relations in conflict law which aims to establish common principles in order to provide efficient legal solutions. However, technological development lets businesses to get involved in alternative way of transactions in comparison with method as what has been done in traditional way. In that case, traditional rules of conflict of law would not provide effective solution the legal problems due to its nature which does not meet the technological developments.

The European Commission has realized the fact that it is necessary to implement new set of rules to fulfill the requirement of technological development in the e-commerce in line with conflict of law so they decided to revise Rome Convention by implementing Rome 1 Regulation on the law applicable to contractual obligation. It aims to provide rules on the contract both in traditional and e-commerce context.

### **4.2.1 Historical Development and Philosophical Approach in the EU**

The European approach has been mainly based on the party autonomy in conflict of law which allows parties to choose the applicable law to their contractual obligations. Choice of law rules have been guided by Rome Convention in the EU since the community regulation implemented. Party autonomy was stipulated as the main principle on the applicable law, but the Convention limited it in context of consumer contracts.

Parties are allowed to decide the governing law of their contract in Article 3 of the Convention and the extent of enforceable consent has stipulated that parties must give consent to the terms of the contract in 'reasonable certainty'<sup>60</sup>. This expression may be adequate to be applied to traditional contractual relationships; however it is necessary to be clarified for transaction by conducted in e-commerce. Because, it is difficult for courts to ascertain what constitutes the adequate consent in e-contracts which has always been controversial issue for consumer protection so far. Therefore, it seems that the Convention does not meet the recent

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<sup>60</sup> Rome Convention Law Applicable Contractual Obligations. 1980. Art 3

technological development in e-commerce which let businesses to draft terms of the contract on the basis of one-sided autonomy.

The Convention specified the extent of consumer contracts into contracts for supply of goods or services and stipulates that chosen law ‘*shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence*’<sup>61</sup>. Thus, it is aimed to provide consumer efficient protection by allowing the application of law that consumer familiar with so consumers are able to know what kind of result they may have after entering into contract. In fact, mandatory rules expression is too ambiguous to understand the content of the rules which could not be derogated. On the other hand, this provision fulfills the requirement equal bargaining principle which is the important proportion of party autonomy. However, there are some conditions in Article 5 that draw the limits for application of the provision.

First condition requires consumer must be tempted to enter into contract by some specific invitation in order to be applied to law of their domicile according to Article 5/2 of the Convention. It means that consumers are divided into two groups as passive and active which are determined in consideration whether they entering into contract with ‘their own initiative’ or with invitation<sup>62</sup>. However, the clear explanation has not been provided as to what extent business’ act would constitute the invitation. In fact, the clear definition on this issue is important in e-commerce due to global nature of the internet that let web pages to use some many methods to attract consumers in different countries.

Another condition requires consumers to ‘take necessary steps’<sup>63</sup> to entering into contract in order to be applied the general rules in Article 5. It is also vague expression to ascertain what constitutes the necessary steps. Especially in e-commerce, it is difficult to specify certain act to be deemed as necessary steps, because variety of technologies has been using on the internet to conduct transaction. Therefore, this condition does not meet the requirement of the technological development in e-commerce even if it is tried to be clarified.

In Green Paper on the conversation of the Rome Convention, these problems have been indicated in a way that ‘*The criteria selected no longer seem adapted to the development of new distance selling techniques. To determine whether or not a contract is within the scope of Article 5, it is always necessary to locate it in space by reference to an aspect such as*

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<sup>61</sup> Rome Convention Law Applicable Contractual Obligations. 1980. Art 5

<sup>62</sup> Debussere, Frederic. International Jurisdiction Over E-Consumer Contracts Quid Novi Sub Sole? 2012. <https://www.law.kuleuven.be/icri/publications/338Intl%20Journal%20of%20Law%20and%20IT.pdf> (visited 20 November 2012)

<sup>63</sup> Rome Convention (1980) Art. 5

*advertising, the signing of a contract or the receipt of an order (Article 5(2))*<sup>64</sup>. Obviously, the European Community aimed to point out the necessity to expand the scope of the Article 5 through the new way of commercial transaction on the internet such as distance selling by electronic contracts. Also, it emphasizes the needs of clarifying the methods to ascertain as to what extent the general rule of consumer's habitual residence would be applied in consideration of technological development in e-commerce.

Consequently, it is obvious that the rules for consumer protection in Rome Convention do not fulfill the new technological development to be applied in e-commerce, because, it has been drafted to govern traditional contractual relationship. Also, provisions have not been defined clearly as to what extent those would be applied which mainly caused controversy on the applicability of them in e-commerce. In order to point out the inadequacy of rules in Rome Convention and suggest possible solution for the problems, Green Paper COM (2002) 654 Final has published to guide to next legislation efforts in the future which have taken a main consideration to draft proposal for a regulation on the law applicable to contractual obligations.

#### **4.2.2 Rome 1 Regulation and Consumer Protection**

The proposal for Rome 1 Regulation has been drafted in 2005 and it brought many discussions on the provision for consumer protection in choice of law. Especially, businesses have criticized the method of applying consumer's habitual residence to contract which suggest refusing the chosen law in favor of the consumer protection. However, European Commission rejected to implement this approach and the recent form of Rome 1 Regulation has been implemented.

Rome 1 Regulation provides party autonomy in choice of law along with limitations in the context of consumer contracts which aims to protect consumer from the derogation of their rights by chosen law. Although it aims to provide more efficient solution on the debate of choice of law in consumer contracts in comparison with the principle of Rome Convention, it has been criticized not to show profound differences with Rome Convention<sup>65</sup>. In order to understand as to what extent Rome 1 Regulation is efficient to provide consumer protection, it is necessary to analyze both proposal and the implemented version of it.

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<sup>64</sup> Green Paper on the conversion of the Rome Convention of 1980.2003  
[http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002\\_0654en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf) (visited 21 November 2012)

<sup>65</sup> Wang. (2010) p.101

#### **4.2.2.1 Proposal for a Regulation on the Law applicable to contractual obligations COM (2005)**

The proposal aims to implement clear and predictable insight upon choice of law in consumer contract in order to make the analysis of enforceability of choice of clause for court. In that case, the Commission's comment on revised Article 5 of Rome Convention stated that *'Paragraph 1 proposes a new, simple and foreseeable conflict rule consisting of applying only the law of the place of the consumer's habitual residence, without affecting the substance of the professional's room for manoeuvre in drawing up his contracts.'*<sup>66</sup> It proposes to simply refuse choice of law clause in consumer contract without considering whether the chosen law may provide more efficient protection for consumers. But, it is necessary to evaluate whether law of the consumer's habitual residence would efficiently protect consumers rights.

Also, the Commission defends the proposed principle on the economic basis in a way that *'a consumer will make cross-border purchases only occasionally whereas most traders operating cross borders will be able to spread the cost of learning about one or more legal systems over a large range of transactions.'*<sup>67</sup> It requires businesses to learn the legal system of states in which they would like to conduct commercial activity. In that case, it would be heavy economical burden for small businesses which create a website to take part in wide range of market as the nature of e-commerce provides such an opportunity to them<sup>68</sup>.

Obviously, the proposal aims to increase the consumer protection by refusing the party autonomy in consumer contract, however it does not consider the small businesses in the context of market efficiency. Thus, it has been criticized by business organization while it was evaluated to decide whether it would be implemented. UEAPME (European Association of Craft, Small and Medium-Sized Enterprises) indicated the harmful effect of the proposal; *'Make cross border trade much more difficult and endanger the functioning of the internal market. Suppliers would need to adapt their contracts to 27 national legal systems in the EU, depending on the consumer's country of residence'*<sup>69</sup>. Also, it provides an advantage to big

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<sup>66</sup>Proposal for a Rome I. 2005

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF>

(visited 21 November 2012)

<sup>67</sup> Ibid.

<sup>68</sup> Tang (2009)p. 207

<sup>69</sup> UEAPME. Towards a comprehensive EU contract law: the Regulation on the law applicable to contractual obligations (Rome I) [http://www.ueapme.com/docs/pos\\_papers/2007/0705\\_pp\\_Rome\\_I.pdf](http://www.ueapme.com/docs/pos_papers/2007/0705_pp_Rome_I.pdf) (visited 21 November 2012)

companies to pursue their activity in many states by using their wide resources which causes the unfair competition practice in internal market.

Consequently, even if the proposal has suggested solving complexity and predictability of choice of provisions in Rome Convention in the context of consumer contracts, it disregards the effect of the proposed rules for businesses in e-commerce. Also, it does not provide more effective consumer protection as Rome Convention does by refusing to test the efficiency of chosen law as to whether have more protective provisions for consumer protection.

#### ***4.2.2.2 Rome 1 Regulation Approach on Choice of Law in Consumer Contracts***

As it is emphasized in Green Paper (COM 2002) 654 Final, the rules of Rome Convention has not been fulfilling development of the distance selling method in e-commerce. Thus, European Commission aims to provide more modern aspect of legislation among the community in line with advancement in e-commerce and Rome 1 Regulation implemented in 2009.

Basically, the regulation let parties to choose the governing law of their contract in Article 3 and it requires 'expressly and clearly demonstrated' consent to the terms of the contract<sup>70</sup>. Obviously, it respects the party autonomy principle, but there is no clarified point as to what extent the consent would be deemed to be given expressly or clear in context of the contracts in e-commerce such as wrap contracts. The Rome 1 Regulation has been drafted on the purpose of implementing more consistent rules which also fulfills the needs of e-commerce. However, it represents almost the same principle in this context as it has been pursued in Rome Convention which has been criticized of being too vague and complex<sup>71</sup>. As it has been seen in case law, the first dispute arises whether the choice of law clause may be enforceable, because there are no clear explanation what constitutes the expressly or clearly given consent to terms of wrap contracts. In fact, most of decisions show that choice of law clause in wrap contracts is enforceable even if it does not comply with the party autonomy principle in traditional contract law. Because, recent legislations has been preferred not to provide explicit definition on this issue by simply recognizing the enforceability of the wrap contracts. Thus, it is necessary to impose effective limitations on consumer contract to protect consumers from derogative chosen law.

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<sup>70</sup> Rome 1 Regulation. No 593/2008. Article 3

<sup>71</sup> Wang. (2010) p.101



The consumer protection was limited into only the contract for sale of goods in Rome Convention which has changed by Rome 1 regulation by considering all consumer contracts into the scope of protection unless those are comply with general scope of Article 6. It is important revision, because it is difficult ascertain as to what constitutes the goods or services in e-commerce<sup>72</sup>. This revision satisfies the purpose of revising the Rome Convention due to its lack of applicability to e-commerce. On the other hand, the extent of goods must be clarified in order not to cause confusion in e-commerce, because services have been excluded to be applied consumer protection provision in Rome 1 Regulation. In fact, the distinction of goods and services would be difficult to determine in electronic transactions. For example, if the software is provided on tangible form such as CD or DVD, it would be considered as goods, and otherwise it would be subject to services such online supply of software<sup>73</sup>. Therefore, it depends on determination of national law to draw a distinction between tangible and intangible goods whether it is considered as good or service. However, it may cause divergent results for consumer protection in the context of sale of goods and services in cross-border level, when subject countries rules stipulate different approach from each others. Consequently, the lack of explanation for content of sale of goods would does not meet the requirement of e-commerce even if the extension of scope of the consumer contracts is provided in Article 6.

Consumer protection has been provided in Article 6 on the basis of consumer' habitual residence. In that case, the applicable law shall be the chosen law which '*...may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable...*'<sup>74</sup> It means that chosen law cannot be simply stroked down by the court on the basis of inadequate consumer protection, the chosen law and the law of the consumer' habitual residence is required to be tested in order to ascertain which one would provide more efficient consumer protection. At this point, courts is required to analyze the consumers rules of two countries in the context of subject dispute, and then apply most favorable rules to the dispute such as withdrawal right or warranty right etc. Therefore, courts do not have to get involved in complex analysis, because all they need to do that analyzing the rules for subject dispute in the context of law of parties' choice and law of the consumers' habitual residence.

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<sup>72</sup> Tang. (2009)p. 214

<sup>73</sup> Loos, MarcoB.M. N. Helberger, L. Guibault, C. Mak & L. Pessers. Digital Content Contract For Consumers. 2012 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2081918](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081918) (visited 22 November 2012)

<sup>74</sup> Rome 1 Regulation. No 593/2008.Article 6/2

The choice of law principle in Article 6 has been drafted in respect of party autonomy by letting parties to choose governing law of their contract along with the guarantee of most efficient protection for consumers. However, there are no provisions to clarify the method to ascertain whether the most favorable law would be determined in consideration of consumer or courts and to what extent the chosen law may be deemed as unfavorable<sup>75</sup>. Thus, it causes the complexity and difficulty to effectively impose the rule into practice. The problem of complexity of this rule has been emphasized by Japanese authority on the basis of rejection to apply the principle of Rome 1 Regulation;

*‘In the discussion during the drafting, those who represented voices of judges opposed to the adoption of a rule to the effect that a consumer would never be deprived of protections given in accordance with the law of the place where he/she has his/her habitual residence...The reason for their opposition was that it would be impossible or very hard for courts to compare, ex officio, which law is more favorable to a consumer.’<sup>76</sup>*

Also, Rome 1 Regulation has excluded specific types of contracts from the application of Article 6 which stipulates consumer protection in choice of law. Those exclusions have caused debates whether the consumer protection is affected by the exclusion, especially in e-commerce. The criticisms have been circling around the exclusion of contracts for supply of services.

The exclusion has been provided in the condition that *‘a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.’<sup>77</sup>* In that case, the contract would be subject to the provision in Article 3 which respects the parties’ choice and limit the choice in context of relevancy test in paragraph 3. Thus, the law of the place where the services is performed seems to be relevant to the transaction, because all the necessary steps, such as place of conducting services and place where consumer receive the benefit of services, are taken in this place. However, it has not been clarified as to which provision of the Regulation will be applied in the case of exclusion when parties’ choice have been stipulated into contract so it is not clear that contract for services is subject paragraph 3 of Article 3. In both cases, consumer protection would be effected in e-commerce, because consumers would not possibly be aware

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<sup>75</sup> Garcimartín Alférez, Francisco J. The Rome I Regulation: Much ado about nothing? 2008. <http://www.simons-law.com/library/pdf/e/884.pdf> (visited 22 November 2012)

<sup>76</sup> Brand, Roland A. The Rome 1 Regulation Rules on Party Autonomy for Choice of Law: A US Perspective. 2009. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1973162](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973162) (24 November 2012)

<sup>77</sup> Rome 1 Regulation. No 593/2008. Article 6/4-a

of the result of the applicable law. Also, consumers will be subject of reasonable relation test again which has no favor in e-commerce.

In fact, consumers may be enticed to get into contractual relation for services in question by advertisement or the design of the webpage if consumers are provided advertisement. Thus, they would think that the contract is subject to law of their habitual residence if webpage is directed to their country even if the service will be performed in another country, because, they enter into subject contract in their country. Obviously, the place that consumers take necessary steps to enter into contract is not considered as default law in favor of place of the performance. This principle has been emphasized by Giuliano Lagarde that '*the contract for service exclusively provided in territory is more closely connected with the place where the service is provided, even if the business performed some actions to target the consumer's habitual residence*'<sup>78</sup>.

Consequently, Rome 1 Regulation has been drafted in respect of party autonomy in respect of party autonomy in general, whereas it provides some limitations on consumer contracts in order to protect weaker party of the contract from aggressive commercial application by business. However, it is obvious that Rome 1 Regulation does not bring essentially modern application in comparison with Rome Convention even if it aims to provide clear and explicit rules that meet the technological development.

Due to common application upon enforceability of wrap contracts, it is necessary to provide protection of consumers in the context of choice of law. The Rome 1 Regulation has effective method to protect consumer that respects to the party autonomy principle by applying analysis of both the chosen law and the law of consumer's habitual residence to ascertain as to which one provide more efficient consumer protection. However, the clear explanation for analysis of favorable law has not been provided, thus it would make a confusion to understand as to what extent courts are supposed to apply parties' choice. Also, exclusion of sale of services would make a confusion to ascertain as to what extent subject transaction constitutes sale of services or goods in e-commerce.

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<sup>78</sup> Tang. (2009) p. 217

## 5 Concluding Remarks

Party autonomy principle is important to provide fair commercial practices by letting parties to decide the terms and equally negotiate what they do not satisfy to agree. From this way, parties would be prevented to face with aggressive commercial practices which may encourage them to pursue further commercial activity. Also, party autonomy is critical issue in conflict of law, because the governing of law of the contract that takes role to decide the contractual obligation of parties is conducted by the rules of the conflict of law. If parties do not control the result of the obligation by arranging choice of clause, this practice would be unfair according to party autonomy principle. Because, party autonomy requires that parties must be in the position to know as to what kind of obligations they will be responsible after entering into contract so as to enforce to terms of contract. Therefore, it is necessary to provide a right to parties to arrange choice of law clause in their contract.

In electronic commercial practice, there would be problem to protect the weaker parties of the contract in the situation where parties are given complete freedom to decide governing law of the contract. Because, electronic consumer contracts, namely wrap contracts, do not give any chance to parties for equally negotiate to terms of the contracts. Basically, electronic consumer contracts let businesses to draft terms of the wrap contracts in line with their intention without any bargaining the terms with consumers<sup>79</sup>. Thus, businesses could choose the law of the country that is most sufficient to conduct their commercial purposes. The enforceability of choice of law clause has been tried to be reputed due to lack of party autonomy in contract making process in court trial.

The information duty of parties has been emphasized in order to oppose to the enforceability of the wrap contracts in a way that consumers must be informed the existence of the terms so as to be bound with result of the contract. However, it has been refused by court on the basis that businesses embedded the notice to show existing terms of the contract into webpage which is prone to attract the consumers' attention to read the terms. In fact, parties know the content of the contract in traditional contract making, because they state their interest on the terms by negotiating each other. However, it is doubtful that consumer would easily understand the terms even if they are aware of the notice so it is not reasonable to impose duty to read requirement of traditional contract law into e-commerce. At this point, the enforceability of the choice of law clause has begun to be discussed on the basis that consumers must know the existence of chosen law.

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<sup>79</sup> Zhang, Mo (2007)

It has argued that choice of law clause must be indicated into contract so that consumers could easily recognize the existing chosen law which governs the result of contract and the obligations of parties. However, courts have granted the enforceability of choice of law clause in wrap contracts, because the notice for contracts itself is considered adequate to point out the choice of law clause to consumers. In fact, consumers would have difficulty to read and then understand the possible obligation that they will undertake as a result of choice of law clause due to distracting and complex style of text of the contract. Therefore, the application of duty to read principle into e-commerce does not fulfill the party autonomy principle of contract law on the basis that consumers do not have a chance to properly review the terms of contract in order to bargain for it by indicating their consent.

Another debate has been going around the consent which is given to choice of law clause in wrap contracts. In this case, it has been controversial whether the consent is given to choice of law clause or contract itself. According to party autonomy principle, validity of consent depends on the equal bargain of terms along with the information duty at the time of contract making. Thus, consumers should not be considered to give their consent to choice of law clause in wrap contracts without any opportunity to properly review the terms, however courts apply to duty to read principle again on the basis that the notice is given to consumers to read the terms which informs them to be aware of choice of law clause. Consequently, it is obvious that choice of law clause of wrap contracts has been enforced even if it does not the requirement of party autonomy, thus regulatory efforts have been focusing on the protection of consumer right by limiting the parties' choice of law.

The regulatory efforts have been taken in variety ways to provide better consumer protection which are still controversial. In the US, the rules of choice of law are implemented in way of fully authorizing the court to decide whether the chosen law would be applicable in line with state policy and connection requirement. This approach makes courts to get involved in complex analysis of different legal system without any given specific method to do it. Thus, it makes courts use its discretion power to strike down the applicability of parties' choice or any other law that provides better protection for consumers. On the other hand, The EU approach provides more simple method for courts by requiring application of favorable law. From this way, courts only need to analyze the efficiency of rules of two different states or countries' consumer rights in the context of subject dispute. Thus, this approach is implemented in respect of party autonomy in a way of considering the efficiency of parties' choice. In the context of testing applicability of chosen law or consumer' habitual residence,

The EU can be deemed to have more precise method in comparison with the US approach even if the specific method has not been described in the EU rules.

In the context of e-commerce, the US approach provides more technologic based rules in UCITA which is important to understand the extent of applicability of rules; however those rules of UCITA are prone to protect the interest of business. On the other hand, the Rome 1 Regulation approach has been implemented on the purpose of modernizing the Rome Convention to meet the recent technological development in e-commerce. However, it does not provide effective application in practice<sup>80</sup> as the application of UCC in e-commerce. Technological aspect of rules is important to provide consumer protection in wrap contracts, because courts could not determine to what extent the rules of consumer protection would be applied for electronic consumer contracts. In that case, The US and the EU approaches have been failed to implement rules that could be effectively applied in e-commerce. However, Rome 1 Regulation has taken step to improve technological aspect in another way; it has left to apply the traditional tests of connection criteria for determining whether the chosen law is enforceable which has been stipulated in UCC, because the connection criteria are not effective to be applied in e-commerce due to international nature of the internet transaction.

As a result, the purpose of choice of law rules must be implemented to protect consumers from the practice of one-sided autonomy in wrap contracts. In order to achieve this goal, law of the parties' choice and law of the consumer' habitual residence must be considered together to ascertain the efficient protection rules for consumer. Obviously, Rome 1 Regulation has achieved this goal by applying analysis of most favorable law. Even if the specific method for application of this method has not been implemented, the EU approach provides more efficient solution for consumer protection, because it tries to find out the best consumer protection rules in respect of party autonomy.

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<sup>80</sup> Wang. (2010) p.101

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